United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 75-4009, [redacted]

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

SALANT CORP., d/b/a CARRIZO MFG., CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review and Cross-Application
for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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2

INDEX

AUTHORITIES CITED

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company interfered with, restrained and coerced its employees, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Company discriminatorily discharged Pedro Patlan, Rebecca Patlan and Carlos Juarez, in violation of Section 8(a)(3) and (1) of the Act.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon a petition to review and set aside an order of the Board (A. 2-50)[1] issued against Salant Corporation d/b/a Carrizo Manufacturing Co., Inc. (hereafter "the Company"), pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*). The Board's Decision and Order is reported at 214 NLRB No. 21. On January 15, 1975, the Board issued an Order denying the Company's motion for reconsideration. 216 NLRB No. 38. In its cross-application for enforcement, the Board has requested that its order against the Company be enforced in full. The unfair labor practices occurred in Carrizo Springs, Texas. This Court has jurisdiction of the proceedings under Section 10(e) and (f) of the Act since the Company maintains its principal office in New York City and "transacts business" within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

A. Background

The Company is the parent corporation of several subsidiaries which have plants in numerous states as well as Mexico and is engaged in the manufacture of men's and children's apparel (A. 11-12; 57-59, 282-283). One of those plants is located in Carrizo Springs, Texas, where the Company makes work pants and jeans (A. 11-12; 57, 59, 275).

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[1] "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

At the Carrizo Springs plant, the Company's operations included cutting, finishing and shipping (A. 12-13; 58). In early 1973[2] the plant started up with only a cutting operation (A. 13; 58). In July this operation was transferred to a new building where the cutting department employees cut the required pieces and packaged them for shipment to the Company's Mexican plants for sewing (A. 12-13; 58-59, 62, 293-294). By October finishing operations commenced in the new facility (A. 13; 58-59, 62, 66, 286). After the garment pieces are sewn together at the Company's Mexican plants, they are returned to the Carrizo Springs plant for finishing (A. 12-13; 58, 293-294). There finishing department employees[3] make buttonholes, press the garments and inspect them for flaws (A. 13; 59, 106-107, 194, 296). After finishing, the garments are stored while awaiting shipment to customers (A. 13; 58-59). Shipping operations commenced in November with warehouse employees performing this function (A. 13; 59, 62, 286).

The Company's management hierarchy is headed by Joseph Lipshie who is president of the Company (A. 12; 72, 287). Percy Stubblefield serves as general manager of the Company's three plants in Mexico, as well as the Carrizo Springs plant, where he spends one quarter of his time (A. 12; 57, 288, 292). Foreman Bill McClain supervises both the warehouse and finishing departments at the Carrizo Springs plant (A. 13; 69, 135-136, 288).

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[2] Unless otherwise indicated, all dates refer to 1973.

[3] The finishing department employees initially earned the minimum wage of $1.60 an hour; but in late November or early December they were changed to a piece rate system which provided a base rate of $2.05 an hour (A. 14; 65-67, 133, 286).

One of the employees working under Foreman McClain was Carlos Juarez, Jr. (A. 18-19; 221-222, 240-241). Juarez, who had never been employed in a garment plant before, was hired on October 2 to work in the finishing department, where he did various jobs and helped McClain (A. 19; 221-222, 239, 252). Approximately four weeks later, McClain transferred Juarez to the warehouse department where he performed the same manual tasks as other employees including sorting, picking, packing, checking, putting stock in bins and loading and unloading trucks (A. 19; 222-223, 243, 249-250, 271-273). He also helped McClain in the warehouse when asked (A. 19; 222-223, 249). Juarez punched a timeclock, was paid overtime and received a wage increase of 15 cents an hour around November 24 (A. 19-20; 225-227, 230).

Pedro Patlan was a finishing department employee who worked under McClain (A. 21; 102-103). Initially, Patlan was hired to sort, size, and box garments coming out of the oven. He received the minimum wage of $1.60 per hour (A. 14, 20; 102-103). Approximately two weeks after he started work, Patlan was reassigned to help McClain and filled the position left vacant by Juarez when he transferred to the warehouse department (A. 20-21; 103, 251). Patlan's primary duty was to pick up the production count from each employee (A. 21-23; 103, 176, 208). He would hand out "gum sheets" to employees who would place bundle tickets on them; since each ticket represented a certain number of dozen, Patlan was able to obtain the proper count and make the correct entry on the production sheet (A. 21-22; 104-106, 141-142, 151-152, 156-157, 173-174; 298-299). In addition to picking up the counts, Patlan's duties included supplying employees with whatever materials they needed, recording employee downtime or absences, and transmitting instructions from

Foreman McClain to the employees (A. 22; 105-106, 107-108, 137, 141, 145, 157, 164, 166, 174-175, 216, 296).

B. Company employees begin to organize

During the Company's startup operations numerous employees had complaints about the Company and talked about getting together to discuss them (A. 14-15; 88-89, 113). Employee Pedro Patlan took the initiative by finding a place where employees could meet to talk over these common complaints (A. 15; 87-88, 113). He secured the Texas Migrant Council building for December 6, at which time 20 to 30 Company employees attended the meeting (A. 15; 87-88, 113-114, 116, 212). During the course of the meeting, those employees present decided to organize, recruit other employees, and contact a union representative in Crystal City, Texas about organizing methods (A. 15; 92, 116-117, 213). After this meeting, Pedro and Rebecca Patlan, accompanied by two other individuals, drove to Crystal City, where they met with Union[4] representatives (A. 15, 95-96, 117).

The next night, December 7, approximately 20 employees, including Carlos Juarez, met with Union President Antonio Rios and organizer Hector Rodriguez at the Texas Migrant Council building (A. 15; 89-90, 93-95, 117-118, 124, 231). Employees asked questions, discussed their employment conditions at the Company, and explained to the Union representatives that they had no fringe benefits (A. 15; 116-118). After detailing Union benefits, Rios and Rodriguez explained the mechanics of organizing, then offered to help (A. 15; 90-91, 95-96, 117-118, 214). A four-member

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[4] Obreros Unidos Independientes.

Committee, one employee from each department, was chosen to keep all employees informed about the group's activities and to persuade other employees to attend subsequent meetings (A. 15; 123-125, 214, 231). Finally, another meeting was arranged for December 17 (A. 15; 124).

C. The Company discharges employees, grants increased benefits and engages in coercive interrogation

Early the next morning, December 8, General Manager Stubblefield met with Office Manager Hobart Graves, Plant Engineer Richard Ray, and Joaquin Salgado, a city councilman hired by the Company to transport garments between Carrizo Springs and the Mexican plants (A. 16; 59-60, 81-82, 100, 289). Foreman McClain joined the meeting later, around 8:30 a.m. (A. 16; 82). Salgado informed Stubblefield of the employees' meeting the night before and reported that the employees were concerned about their benefits and wages (A. 16-17; 60-61, 77-78). In response to Stubblefield's inquiry, Salgado indicated that he obtained his information from employee Patlan who had attended a meeting (A. 17; 61, 79). As soon as the Company meeting ended, Foreman McClain returned to the plant where he confronted employee Juarez; he asked Juarez if he knew anything about the meetings held by dissatisfied employees on the two previous evenings (A. 35; 231-233). When he answered yes, McClain asked why Juarez had not informed him about the situation *(Ibid.)*. Finally, McClain questioned him about what the employees wanted; Juarez told him that he was not satisfied with his wages and he had no benefits (A. 35; 232-233).

The following Monday, December 10, Stubblefield, Ray and McClain remained in the plant the entire day observing the employees (A. 17;

126-127, 206-207, 215, 216-218, 300-301). That afternoon both Pedro Patlan and his wife, Rebecca, who was an office clerk, were discharged and given termination slips stating "unsatisfactory performance on the job" (A. 17, 27-28; 62-64, 68, 80, 83, 102, 302-303). When Pedro Patlan asked McClain for a more specific reason he was first told "you just didn't work out"; he was then told that buttonhole machine employees "were talking too much and not doing enough work" (A. 27; 127-128). Rebecca Patlan was admittedly discharged solely because her husband was being terminated (A. 28; 302-303). That same day Stubblefield telephoned President Lipshie to explain that dissatisfied employees were holding meetings (A. 17; 72-73, 286, 300). He reminded Lipshie of their previous conversation regarding employee benefits[5] and pleaded to "hurry this thing up a little" (A. 17; 73, 286).

On December 12 Company President Lipshie responded to Stubblefield's request (A. 17-18; 286-288). Stubblefield then assembled all the employees and announced that benefits such as wage increases, weekly paychecks, holidays, vacations, hospitalization-medical insurance, life insurance and optional dependent coverage would be effectuated (A. 17-18; 69, 287, 343-346). He explained to employees that as of now their wages and benefits compared favorably with the industry (A. 18; 287, 346). He also pointed out to them that "Unions have tried [to organize] since [1966] and have not succeeded because our employees said No to the

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[5] In early December President Lipshie had attended the "opening celebration" for the new facility at the Carrizo Springs plant (A. 14; 71-72, 285-286). On this occasion he told Stubblefield that it was necessary for the plant to move "ahead with [its] program of wage rates, benefits and this sort of thing" (A. 14; 72-73, 286). President Lipshie also explained that he would discuss the matter with other Company officials and get back in touch with Stubblefield when he decided what changes to make (A. 14; 72-73, 285-286).

Union" (A. 18; 288, 346). Stubblefield concluded his speech by asking the employees to "work together" with him "so I can always talk to you about happy news as I did today" (A. 18; 287-288, 346).

Later in the day, Personnel Manager Harpo Garcia ordered Carlos Juarez to the Company office (A. 35; 235-236). There, Foreman McClain told Juarez that even though he was his "best friend . . . I have to terminate you from the job because of unsatisfactory work" (A. 18, 35; 236-237, 271). Juarez denied that this was the reason and told McClain he was fired for requesting increased wages and benefits (A. 35; 237). On his separation slip, the Company noted Juarez was terminated for "dissatisfied work" (A. 34-35; 64-65, 342). As Stubblefield explained, Juarez was "disloyal" because he refused to inform McClain about the dissatisfaction among employees (A. 34-35; 65).

II. THE BOARD'S CONCLUSION AND ORDER

On the above facts, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating an employee and by granting benefits such as wage increases, holidays, vacations, medical and hospital insurance, life insurance and optional dependent coverage (A. 3, 35-36, 43-44). The Board also found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Pedro Patlan, Rebecca Patlan and Carlos Juarez, Jr. to discourage employee support for the Union (A. 3, 36, 38, 45).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any like or related manner interfering with, restraining or coercing its employees in the exercise

of their rights[s] . . . guaranteed in Section 7 of the Act" (A. 46-47). Affirmatively, the Board's order requires the Company to offer employees Pedro Patlan, Rebecca Patlan and Carlos Juarez reinstatement to their former or substantially equivalent work positions. The Board's order also requires the Company to make the employees whole for any loss of wages suffered as a result of the Company's discrimination against them, and to post the usual notices (A. 47).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY COERCIVELY INTERROGATING AN EMPLOYEE ABOUT HIS UNION ACTIVITIES AND BY GRANTING INCREASED WAGES AND OTHER EMPLOYMENT BENEFITS FOR THE PURPOSE OF DISCOURAGING UNION ACTIVITIES

As indicated in the Counterstatement, the Company reacted swiftly to stifle the incipient union activity at its Carrizo Springs plant. Thus, in addition to the discriminatory discharge of three employees, the Company used coercive interrogation and the grant of sizeable benefits to undercut employee support for the Union.

1. Coercive Interrogation

As shown above (*supra*, p. 6), Foreman McClain attended the Company meeting on December 8 at which the Company learned of the employee organizational meeting held the night before. McClain immediately confronted employee Carlos Juarez and asked him what he knew about the employees' meeting. When Juarez admitted that he knew of

the meeting, McClain demanded to know why Juarez had not informed him sooner. McClain also pressed Juarez to find out what the employees wanted. Juarez indicated that the employees were dissatisfied with the Company's wages, to which McClain replied "don't you think $1.60 is enough?" (A. 35; 232). Juarez also indicated that he shared the employees' dissatisfaction with the Company's wages and benefits. McClain offered Juarez no reasons for his questioning and provided no assurances against reprisals. And just four days later, Juarez was discharged for reasons which the Company admits (Br. 6, 9, 12) are violative of the Act. See *infra*, pp. 13-18. Thus, McClain's interrogation of Juarez conveyed the Company's hostility towards the employee organizing activity, sought to uncover the reasons for that activity and carried the seeds of Juarez' own unlawful discharge. In light of these circumstances, the Board could reasonably find that this interrogation was coercive. See, *N.L.R.B. v. Milco,* 388 F.2d 133, 137 (C.A. 2, 1968); *N.L.R.B. v. Scoler's Inc.*, 466 F.2d 1289, 1291 (C.A. 2, 1972); *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 296-297 (C.A. 2, 1972); *N.L.R.B. v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 364 (C.A. 6, 1963).

2. Grant of Benefits

The Company's anti-union campaign is further evidenced in its expedited grant of benefits to the employees. The December 12 announcement of the benefits, their amount and their timing (which was contemporaneous with the discriminatory discharges), clearly show that they were prompted by the employees' budding interest in union representation. As indicated in the Counterstatement, *supra,* p. 7, the benefits

conferred were substantial. All employees received wage increases even though certain workers had just received raises when the piece rate system was implemented nine days earlier on December 3 (A. 343, 347). The increases ranged from 5 cents an hour for piece rate workers to 90 cents an hour for texograph markers (A. 347). Insurance benefits covering hospitalization, medical, life and optional dependent coverage were instituted effective January 1, 1974 (A. 348). Holiday and vacation benefits were also granted. Since all of these grants of benefits were explicitly linked to the Company's request that it and the employees "work together, . . . solve our problems together, and . . . progress together" (A. 346), there can be no doubt that the Company's purpose was to undermine employee support for the Union (A. 43-44). Indeed, as inducements to abandon their organizational activities, these benefits were plainly unlawful. For the Supreme Court noted "the danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow, and which may dry up if it is not obliged." *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409-410 (1964). Absent evidence that the Company's benefits were granted solely for reasons unrelated to the organizing activity, the Board could reasonably find that they were intended to vitiate employee support for the Union, in violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Exchange Parts Co., supra,* 375 U.S. at 409-410; *N.L.R.B. v. Gruber's Super Market, Inc.*, 501 F.2d 697, 701-703 (C.A. 7, 1974); *M.P.C. Restaurant Corp. v. N.L.R.B.*, 481 F.2d 75, 77 (C.A. 2, 1973).

The Company contends (Br. 20-21) that the decision to grant increased benefits was made prior to the employees' organizational activity.

However, the record shows that the Company had only a general plan to upgrade benefits which was not, until the appearance of the organizing activity, communicated to the employees. Thus, during President Lipshie's visit to the Company in early December, he and Stubblefield briefly talked about a benefits program, but no decision to implement it was made. In fact Stubblefield testified that President Lipshie "advised me that he would discuss [benefits] with the other officials of the Company . . . and that he would get back in touch with me the following week to advise me what these changes should be" (A. 286). The decision to increase benefits was finally made on December 12, two days after Stubblefield advised President Lipshie to "hurry this thing up a little" because dissatisfied employees were holding organizational meetings. That the improvement in benefits was designed to counteract employee interest in the Union is further demonstrated by Stubblefield's statements to the employees when announcing the new benefits. Thus, Stubblefield emphasized that since 1966 the Company's employees had said "no" to unions and urged the employees to "work together" so that he could always bring "happy news" as he had that day (A. 18, 43; 346). In short, the Company was clearly expediting its general plan for improved job terms and implementing those benefits in a manner designed to undercut support for the Union.

The Company's reliance (Br. 20-21) on *N.L.R.B. v. M.H. Brown*, 441 F.2d 839, 842-843 (C.A. 2, 1971) is misplaced, for the facts there are distinguishable from those in the instant case. In *Brown* the employer's president, prior to any union activity, intimated to employees that wage increases would be forthcoming; moreover he had a valid business purpose in instituting the raises when he did, and only certain

skilled employees received raises. Based on these and other facts, the Court held that the employer was justified in granting wage increases that it had planned to institute prior to initiation of employee union activity. However, the record in the instant case clearly shows there was no definitive plan to increase benefits prior to the employees' organizational activities. Nor did the Company show any "compelling business reasons" (*N.L.R.B. v. Gruber's Super Market, Inc., supra,* 501 F.2d at 701) to justify its expedited grant of benefits. In view of these circumstances, the Board could reasonably conclude that the Company's well-timed grant of benefits was violative of Section 8(a)(1) of the Act.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEES PEDRO AND REBECCA PATLAN AND CARLOS JUAREZ TO DISCOURAGE EMPLOYEE SUPPORT FOR THE UNION.

The Company admits that it discriminatorily discharged Pedro Patlan and Carlos Juarez if they are found to be employees under the Act. However, the Company contends (Br. 12-17) that Pedro Patlan and Carlos Juarez are supervisors and thus not entitled to the Act's protection. With regard to Rebecca Patlan the Company claims (Br. 18-19) that she was a "confidential employee" and that she was discharged for reasons not unlawful. Accordingly, the Company has violated Section 8(a)(3) and (1) of the Act if, as we show below, the Board properly rejected these contentions.

A. The Board properly found that Pedro Patlan and Carlos Juarez were not supervisors

Section 2(3) of the Act excludes supervisors from the definition of employees. Section 2(11) of the Act defines the term "supervisor" as follows:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The determination whether an individual is an "employee" or "supervisor" within the meaning of the Act calls upon the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). As pointed out by this Court in *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1001 (C.A. 2, 1973), cert. denied, 414 U.S. 1062, with reference to the Board's discretion in evaluating supervisory status, "the Board's findings in this area are entitled to special weight since it possesses expertise 'in evaluating actual power distributions which exist within an enterprise'" citing *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968). Accord: *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870 (C.A. 2, 1970), cert. denied, 402 U.S. 907. Thus, reviewing courts will not lightly disturb the Board's findings "even though a court would, as an original matter, decide the case another way." *N.L.R.B. v. United Insurance Co. of America*, 390 U.S. 254, 260 (1968).

While it is settled that Section 2(11)'s list of supervisory powers is to be read in the disjunctive, the section also "states the requirements of independence of judgment in the conjunctive (i.e., *in connection*) with what goes before" (emphasis in original). *Poultry Enterprises, Inc. v. N.L.R.B.*, 216 F.2d 798, 802 (C.A. 5, 1954). See also *N.L.R.B. v.*

Southern Bleachery & Print Works, 257 F.2d 235, 239 (C.A. 4, 1958), cert. denied, 359 U.S. 911. Nor is it enough that an individual occasionally performs one of the functions listed in Section 2(11); he must consistently display true independence of judgment in implementing this authority. The exercise of some supervisory tasks in a merely "routine," "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *N.L.R.B. v. A.E. Nettleton Co.*, 241 F.2d 130, 132 (C.A. 2, 1957). *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 569 (C.A. 2, 1953). Accordingly, the Courts have "distinguished between straw bosses, leadmen, setup men and other minor supervisory employees, on the one hand, and the supervisors vested with such genuine management prerogatives as the right to hire or fire, discipline or make effective recommendations with respect to such action." *Poultry Enterprises, supra*, 216 F.2d at 801, citing the Senate Committee Report with respect to Section 2(11) of the Act. Accord: *Precision Fabricators, Inc. v. N.L.R.B., supra*, 204 F.2d at 569. We now show that, tested by the above principles, the Board's finding that Pedro Patlan and Carlos Juarez are employees and not supervisors was clearly proper.

As the Counterstatement shows, *supra*, p. 3, the Company's finishing and shipping departments had been in operation not more than two and a half months when employees Patlan and Juarez were discharged in early December. At the time they were hired, neither one had ever worked in a garment plant before or had any relevant work experience. There is no merit to the Company's claim (Br. 12) that Patlan and Juarez were made supervisors just a few weeks after being hired for jobs in which they had no actual experience. First, at no time was either Patlan or Juarez ever informed that he had been delegated authority to act in a

manner reserved to those in a supervisory position (A. 25; 292). *N.L.R.B. v. Southern Seating Co.*, 468 F.2d 1345, 1347 (C.A. 4, 1972). Second, the record evidence clearly shows that Patlan's and Juarez's duties were predominantly those of rank-and-file employees and any minor assistance given to other employees was "routine" or "clerical," in nature.

Employee Patlan's training to be an alleged supervisor lasted about 30 minutes (A. 21; 103-104). His primary task was to "pick up the count" from other finishing department employees before entering it on the production sheet. This task, like keeping records of downtime and absences for payroll purposes, which he also did is the work of a plant clerical. Patlan performed numerous other routine duties such as insuring that machine operators had whatever materials they needed, obtaining staples for inspectors, and calling the mechanic if a machine malfunctioned (A. 21-22; 106, 209-210). For this his wage rate was increased from $1.60 per hour to $1.675 per hour (A. 21; 73). Although he may have told an employee on one or two occasions to move to another machine because of a breakdown, the employees usually made the transfer on their own initiative (A. 144-145, 163). Such an instruction was obviously routine and did not require the use of any independent judgment.

Moreover, there is no evidence that Patlan had any authority to hire, discharge, lay off, reward, discipline or promote other employees in the finishing department (A. 24). Nor did he have any authority to adjust grievances. Since this was the first time he had worked in a garment factory, Patlan could not instruct new employees because he knew nothing about the operation of the press machines (A. 130). Finally, Patlan gave substantive orders to employees only after being directed to do so by Foreman McClain. The record fully supports employeee

Patlan's view of his own job as that of a "messenger boy" for McClain (A. 164).

Initially, Carlos Juarez had the same job as Patlan, but he was transferred to the shipping department approximately five weeks before his discharge. In the warehouse Juarez had to report to McClain each morning ing, at which time he received instructions concerning what work was to be done. His job, like the rest of the employees, was manual (A. 273). He sorted, packed, and stacked boxes as well as loaded and unloaded trucks. Whenever a new employee was hired, Foreman McClain would tell Juarez where he wanted him to work (A. 228). Finally, the record shows that Juarez, like Patlan, was an hourly paid employee,[6] punched a time clock, and attended no supervisory meetings.

It is clear that supervisory authority was vested in Foreman McClain, not Patlan or Juarez. As related above, these two employees, like the finishing and shipping departments which McClain supervised, were new. Although Patlan and Juarez may have been leadmen it is clear that McClain reserved all authority to make the decisions which required experience, judgment and discretion. Thus, McClain always told Patlan and Juarez what he wanted certain employees to do. When finishing department employees were needed in the warehouse, McClain told Patlan who to send over (A. 22; 107). In other instances, McClain would "quite often" switch personnel around in the warehouse without telling Juarez about it until later (A. 225-226). McClain handled all disciplinary actions either on his

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[6] Juarez was paid $1.75 per hour (A. 19, 26; 74). At the time of their discharge, Patlan and Juarez were being paid less than rank and file employees in the finishing department who received a base wage of $2.05 per hour (A. 26; 67).

own or by giving verbal warnings to employees through Patlan or Juarez (A. 22; 108-109, 268). Neither employee had any authority to discipline other employees who refused to carry out their instructions. Similarly, Patlan and Juarez had no general authority to grant overtime. The record shows that McClain was the only person who could authorize overtime, but Patlan and Juarez were instructed to inform certain employees to remain or pick volunteers (A. 20-22; 180, 229). Informing employees of their overtime assignments in such a circumstance is routine and clerical in nature and does not involve the independence of judgment indicative of supervisory status. *N.L.R.B. v. Cousins Associates,* 283 F.2d 242, 243 (C.A. 2, 1960); *N.L.R.B. v. Swift & Co.,* 240 F.2d 65, 67 (C.A. 9, 1957).[7] In these circumstances, as the Board noted, "it seems *contra* to the realities of the industrial world that the [Company] would have turned over to Patlan and Juarez the exercise of independent judgment without additional training when their experience in the garment field was limited to a few weeks" (A. 26).

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[7] The Company's claim (Br. 17) that the Board erred in accepting the "statements" of Patlan and Juarez as proof of their "employee" status is totally without merit. These employees were obviously familiar with, and competent to testify on the actual duties and responsibilities of their jobs. It should also be noted that the Company representative most knowledgeable about Patlan's and Juarez's work status was Foreman McClain, who although present at the hearing, did not testify on the Company's behalf. Instead, General Manager Stubblefield testified vaguely about the duties and responsibilities of Patlan and Juarez (A. 289-290). Stubblefield admitted that he was at the plant only about one-fourth of his time (A. 292), and thus could not have had much opportunity to observe the two workers. The Board was clearly not required to accept the testimony of Company witness over that of the employees.

As the Company's arguments indicate, it is attempting to support its case by attacking the Administrative Law Judge's credibility findings. However, as this Court has held, "questions of credibility are for the trier of fact" whose resolution will not be overturned by the Court unless the credited testimony is "hopelessly incredible" on its face "or flatly contradicts either a so-called 'law of nature' or undisputed documentary testimony." *N.L.R.B. v. Warrensburg Board & Paper Corp.,* 340 F.2d 920, 922 (C.A. 2, 1965). See also, *M.P.C. Restaurant Corp. v. N.L.R.B., supra,* 481 F.2d at 77.

B. The Board properly found that Rebecca Patlan was not a confidential employee

The Board found that Rebecca Patlan was discharged because of her relationship to Pedro Patlan and his union activities (A. 3, 28, 38). The Company does not challenge that finding (Br. 19), but urges that Mrs. Patlan was a "confidential" employee and thus outside the Act's protection. However, the record fully supports the Board's finding that Rebecca Patlan performed only general office work and did not have the duties of a confidential employee (A. 28). First, while working as a receptionist, "girl Friday," typist and file clerk, Mrs. Patlan never handled any confidential matter relating to labor relations or other aspects of management.[8] Indeed, she was not even aware that General Manager Stubblefield kept a file cabinet in his office which allegedly contained confidential documents (A. 328). More relevant, though, is the fact that two weeks before her discharge Patlan began training to become the payroll clerk, a job "which entailed computing the amount that the employees earned from the payroll cards" (A. 28; 85-86, 306). Thus, at the time of her discharge, she was not acting in the capacity of a "girl Friday" any more, and another employee, Jennifer Jackson, was responsible for typing Stubblefield's letters (A. 28; 328). The instant case is easily distinguishable from *N.L.R.B. v. Wheeling Electric Co.*, 444 F.2d 783 (C.A. 4, 1971), where the Board conceded that the individual was a confidential secretary to the manager and had access to company confidential information.

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[8] The Board has defined "confidential" to mean "those employees who assist and act in a confidential capacity to persons who formulate, determine, *and* effectuate management policies . . . ." *The B.F. Goodrich Co.*, 115 NLRB 722, 725 (1956). See also, *Westinghouse Electric Corp.*, 163 NLRB 503, 508 (1967), enf'd 398 F.2d 669, 670-671 (C.A. 6, 1968), *Holly Sugar Corp.*, 193 NLRB 1024, 1025-1026 (1971). Cf. *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 283-284 (1974).

In *Wheeling*, the Court held that a confidential employee "cannot be granted the protection afforded ordinary employees under the Act." 444 F.2d at 788. However, the credited evidence plainly shows, as the Board found, that Patlan was an "ordinary" employee working as a payroll clerk at the time she was unlawfully discharged.[9]

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[9] The Company further claims that Rebecca Patlan's discharge was not unlawful because it suspected she would be upset over the admitted discriminatory firing of her husband (Br. 18-19). But it is well settled that Section 8(a)(3) and (1) is violated where an employee is discriminated against because of the union activity of a relative. See, e.g., *J.P. Stevens Co. v. N.L.R.B.*, 441 F.2d 514, 519 (C.A. 5, 1971), cert. denied, 404 U.S. 830; *N.L.R.B. v. Newton Co.*, 236 F.2d 438, 444 (C.A. 5, 1956); *N.L.R.B. v. Wix Corp.*, 309 F.2d 826, 835-836 (C.A. 4, 1962).

CONCLUSION

For the reasons stated above, it is respectfully requested that a judgment be entered denying the Company's petition for review and granting the Board's cross-application for enforcement in full.

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June 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SALANT CORP., d/b/a CARRIZO MFG., CO., INC.,	)	
Petitioner,	)	
	)	Nos. 75-4009
v.	)	75-4043
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 20th day of June, 1975.